WEST VIRGINIA SUPREME COURT OF APPEALS

JOHN HALE,

Petitioner,

v.

Claim No. 2004024859 PI
Supreme Court No. 101028

ROCKSPRING DEVELOPMENT, INC.,

Respondent.

Response

~~BRIEF~~ ON BEHALF OF
ROCKSPRING DEVELOPMENT, INC.
IN OPPOSITION TO
CLAIMANT'S PETITION FOR APPEAL

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September 20, 2010

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I. NATURE OF THE PROCEEDING

This claim comes before this Court pursuant to the claimant's (John Hale) appeal from the ruling of the Workers' Compensation Board of Review dated August 9, 2010 (Exhibit A), which affirmed the Decision of Administrative Law Judge dated February 1, 2010 (Exhibit B). The Administrative Law Judge had affirmed the Self-Insured Employer's order dated November 4, 2008, denying a request to add "major depressive disorder, single episode, severe, with psychotic features" as a compensable condition (Exhibit C).

The employer, Rockspring Development, Inc., respectfully requests that the Workers' Compensation Board of Review order dated August 9, 2010 (Exhibit A), be affirmed.

II. STATEMENT OF THE FACTS

The claimant was lifting a wooden pallet (weighing 30-40 pounds) when he developed back pain. He did not suffer any loss of consciousness and was able to walk after the incident.

The claimant went to see Dr. B. Aranas (his family doctor) who prescribed physical therapy and an MRI.

The claimant continued follow-up visits with Dr. Aranas for back pain. A lumbar MRI was ordered which on December 9, 2003, revealed no focal disc herniation.

On December 31, 2003, the claim was held compensable for a lumbosacral sprain/strain (Exhibit D).

On January 23, 2004, the claimant was examined by Dr. Aranas. The diagnosis was a cervical strain and lumbar strain.

On February 2, 2004, a bone scan was performed. This was read as normal without evidence of a fracture, significant arthritis, or metastatic disease.

The claimant continued to see Dr. Aranas approximately every four weeks. He complained of left leg tingling and stated his left leg gave out with weight bearing. The claimant was using a tens unit.

Dr. Paul Bachwitt examined the claimant on June 9, 2004 (Exhibit E). He felt the claimant had reached maximum medical improvement. The claimant had multiple contradictions during his physical examination and his motions were too low to be credible. His recommendation was a 5% lumbar impairment.

The claimant was treated at Marshall University Psychiatric Associates by Richard Gardner, PA-C in 2004 and 2005 for depression.

He also continued treatment with Dr. Aranas. The claimant stated on November 28, 2005, that he had hurt his neck and back at work while prying on a switch with a slate bar which slipped. This injury had occurred on November 23, 2005. The claimant was diagnosed with an acute cervical strain and a chronic lumbar sprain. The claimant stated today that he injured his neck and re-injured his low back.

On December 5, 2005, Dr. Aranas recommended a cervical MRI for complaints of neck pain and numbness in the shoulder, arm and fingers.

The claimant submitted an Intake Narrative dated June 30, 2004, from William Downs, MSW (Exhibit F).

The claimant submitted treatment records from Richard Gardner, PA-C from July 21, 2004, through June 1, 2006, all to be considered as one document (Exhibit G).

The claimant submitted a Diagnosis Update completed by Dr. Bonifacio Aranas dated October 14, 2008.

The claimant submitted the report of Dr. Bruce A. Guberman dated June 9, 2009. Therein, he opines that the claimant has reached maximum degree of medical improvement for

his orthopedic injury and is entitled to an additional 3% whole person impairment. He offers no opinion on the claimant's possible depression (Exhibit H).

The employer submitted the Claims Administrator's order dated December 31, 2003, holding the claim compensable for 846.0 Sprain/Strain Lumbosacral (Exhibit D).

The employer submitted Rule § 85-20-12.2.a which governs psychiatric treatment in workers' compensation claims, and shows that an injury-related psychiatric diagnosis has to be made within 6 months of the date of injury. The West Virginia Supreme Court of Appeals has recently overruled this provision, but at the time the provision was submitted the Court had not ruled.

The employer submitted Rule § 85-20-12.5.a which governs psychiatric treatment in workers' compensation claims, and shows that the initial evaluation must be authorized by the self-insured employer (Exhibit I).

The employer submitted an Intake Narrative from University Psychiatric Associates dated June 30, 2004 (Exhibit F).

The employer submitted an office note from Dr. Bonifacio Aranas dated February 25, 2002, showing diagnosis of anxiety disorder (Exhibit J).

The employer submitted an office note from Dr. Bonifacio Aranas dated February 19, 1999, showing diagnosis of anxiety disorder and prescription for Xanax (Exhibit K).

The employer submitted an office note from Dr. Bonifacio Aranas dated September 13, 1990, with a diagnosis of lumbar pain (Exhibit L).

The employer submitted an office note from Dr. Bonifacio Aranas dated March 31, 1994, showing diagnosis of lumbosacral strain, and ordering an x-ray of the lumbosacral spine (Exhibit M).

The employer submitted a report by Dr. Paul Bachwitt dated November 6, 2009. Therein, he offers no opinion on the claimant's possible depression. However, he does state on pages six through eight (Exhibit H):

1. Based on your review of the prior treatment notes, your prior evaluation of the claimant, and the report of Dr.Guberman, do you believe that the claimant's symptoms have progressed?
   It **is my opinion that the claimant's symptoms have not progressed. His motions are much better today than they were during my previous examination on June 9, 2004, which would indicate improvement and wellness rather than worsening. There is no clinical evidence of nerve root compression as lower extremity motors are 515, reflexes are present and symmetrical, and sensation is entirely within normal limits. Sitting straight leg raising test is negative at 90 degrees bilaterally. There is no thigh or calf atrophy.**

2. Do you believe that the claimant's compensable condition has worsened or been aggravated?
   Based **on today's examination, I do not feel the claimant's condition has worsened or been aggravated.**

3. Do you believe the claimant has reached maximum medical improvement from the compensable injury of November 22, 2003?
   Impression: Lumbar sprain/strain
   In regard to the injury of November 22, 2003, I feel the claimant has reached maximum medical improvement. This simple lumbar sprain/strain should have resolved within two months or less. Sprain/strains resolve within eight weeks at the most. Reference is made to Official Disability Guidelines by the Work Loss Institute and West Virginia Workers' Compensation law Title 85, Series 20. The guidelines for the treatment of low back sprains/strains are contained in Title 85-20-37. It states that 50% to 60% of injured workers with an injury to the low back recover within one week. It further states that failure to improve in four weeks warrants an appropriate second opinion. Almost all injured workers with low back musculoligamentous sprain/strains can be treated satisfactorily. No

indications exist for surgery in the treatment of low back musculoligamentous injuries. Treatment options are short-term bed rest for two days, analgesics, muscle relaxants, anti-inflammatory nonsteroidal medications, physical therapy, manipulation of the spine, occasional trigger point injections, and a lumbosacral corset or bracing. Inappropriate treatment is operative treatment, prolonged bed rest longer than two days, narcotic medication for a prolonged period, home traction, and inpatient treatment. The estimated duration of care is 0 to 4 weeks, not to exceed 8 weeks. A diagnosis of sprains/strains exceeding eight weeks requires a detailed reevaluation. The Commissioner may require an IME to verify the diagnosis and will authorize continued treatment/coverage in its sole discretion. The anticipated outcome is resumption of normal activity without residual symptoms in most cases. Transitional activities may be required.
37.8 states that modifiers (age and co-morbidity), co-morbidity (e.g., degenerative disc disease, spondylolisthesis, segmental instability, osteoporosis, spine deformity) may be associated with a higher incidence of persistent symptoms, but are <u>not</u> compensable conditions.

4. To what extent, if any, is this claimant permanently impaired from the compensable back injury of November 22, 2003?
Under the Range of Motion model, in regards to the lumbar spine, he would fall into Category II-B, Table 75, page 113. This is a base rating of 5% whole person impairment. In regards to additions by means of combined values for neurological deficits, he has none and the addition would be 0 percent. In regard to motion restriction, the only motion restricted is forward flexion and it is restricted in the amount of 5%. The base rating of 5% combines with the motion restriction of 5% to equal 10% whole person impairment.
Based upon the history and physical findings, the claimant is classified under the Lumbar Category II of Table 85-20-C with the impairment rating ranging from 5 to 8% whole person impairment rating for that category.

The range of motion impairment of 10% does not fall within the accepted ranges for this category. Therefore, the impairment has been adjusted to 8% pursuant to Rule 20, Section VII.
The claimant previously received a 5% lumbar award which is subtracted from today's recommendation of 8%, leaving a net of 3% whole person impairment.
Therefore, 3% whole person impairment is my total net recommendation for the injury of November 22, 2003.

5. Please comment on the report of Dr. Bruce Guberman, and state whether or not you agree with Dr. Guberman, and whether Dr. Guberman applied the AMA Guides, 4th Edition, correctly. Please explain in detail.
Dr. Guberman's mathematical calculations are slightly different than mine. He found the same amount of motion impairment as did I, but he did it in a slightly different manner with 1% for right lateral, 0% for left lateral, 2% for flexion and 2% for extension. My total was also 5%. This seems to be the only difference in our reports.

III. RULING OF THE WORKERS' COMPENSATION BOARD OF REVIEW

The Workers' Compensation Board of Review by decision dated August 9, 2010 (Exhibit A), affirmed the decision of Administrative Law Judge dated February 1, 2010 (Exhibit B). The Administrative Law Judge had affirmed the Commission's ruling dated November 4, 2008, denying a request to add "major depressive disorder, single episode, severe, with psychotic features" as a compensable condition (Exhibit C). In its order, the Office of Judges plainly and properly stated on page five:

> On reviewing and considering all the evidence, in accord with a preponderance of the evidence of weight, the claimant's request to add 311. Depression, as a compensable component of the claim was not supported by evidence the condition was sustained in the course of and resulting from employment or that it occurred as a result of the claimant's compensable low back condition. Moreover, the claimant had a long history of depression and anxiety such that it was more likely anxiety and depression experienced by the claimant was an extension of the prior condition. While the intake interview of Mr. Downs said the

> claimant's psychiatric condition was "probably" precipitated by the injury and no doubt believed this conclusion was more likely than not, the evidence of the extended history of psychiatric conditions makes it more likely that the opposite is true. While the claimant need not prove a prior condition did not cause the condition, the claimant was required to prove the condition resulted from the compensable injury, but did not. The claimant has had a history of problems since childhood as well as a family history of psychiatric problems. The claim administrator denied the request to add depression as a compensable component of this claim with good reason for failure of the claimant to prove a causal connection unaffected by prior conditions.

IV. ASSIGNMENT OF ERROR

The claimant basically incorrectly asserts as assignment of error that the Workers' Compensation Board of Review was plainly wrong in its weighing of the evidence. He cites no error but merely wants to rehash the evidence submitted below and complain because the Workers' Compensation Board of Review and Office of Judges reached a conclusion other than what he would like. Such is not error and this Court should not now substitute its opinion as to what the evidence demonstrates as long as the decision reached below can be supported by the evidence as accepted and interpreted by the Workers' Compensation Board of Review and Office of Judges.

V. STANDARD OF REVIEW

The standard of review applicable to the Board of Review on an appeal from an Administrative Law Judge is set out in West Virginia Code § 23-5-12(b), which provides, in pertinent part, as follows:

> [The Board of Review] shall reverse, vacate or modify the order or decision of the Administrative Law Judge if the substantial rights of the petitioner or petitioners have been prejudiced because the Administrative law Judge's findings are:
>
> (1) In violation of statutory provisions; or
>
> (2) In excess of the statutory authority or jurisdiction of the Administrative Law Judge; or

(3) Made upon unlawful procedures; or

(4) Affected by other error of law; or

(5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Rhodes v. Workers' Compensation Division, 209 W. Va. 8, 543 S.E.2d 289 (2000).

The standard of review available to the Board of Review in West Virginia Code § 23-5-12(b) is the same as existed before the Board of Review was created. After May 12, 1995, the predecessor to the Board of Review, the Workers Compensation Appeal Board's, reviews were governed by the same standard. The West Virginia Supreme Court of Appeals has held "when the Workers' Compensation Appeal Board reviews a ruling from the Workers' Compensation Office of Judges it must do so under the standard of review set out in West Virginia Code § 23-5-12(b), and failure to do so will be reversible error." Syl. Pt. 6, Conley v. Workers' Compensation Division, 199 W. Va. 196, 202, 483 S.E.2d 542, 545 (1997); Rhodes, supra.

Moreover, the findings and conclusions of the Office of Judges are to be accorded deference by the Board of Review. Conley, supra. In addition, the "clearly wrong," which is sometimes referred to as "plainly wrong," standard of review set out in W. Va. Code § 23-5-12(b)(5) is a deferential one, which presumes an administrative tribunal's actions are valid as long as supported by substantial evidence. Syl. Pt. 3, In re Queen, 196 W. Va. 442, 473 S.E.2d 483 (1996); Frymier-Halloran v. Paige, 193 W. Va. 687, 695, 458 S.E.2d 780, 788 (1995); Conley, supra; Rhodes, supra. Furthermore, determinations regarding credibility and reliability by an Administrative Law Judge have been addressed by the Supreme Court in Martin v. Randolph County Board of Education, 195 W. Va. 297, 465 S.E.2d 399 (1995), wherein the Court stated that as a general rule, "[W]e uphold the factual findings of an Administrative Law Judge if they are supported by substantial evidence...We cannot overlook the role that credibility plays in factual determinations, a matter reserved exclusively for the trier of fact." Accordingly,

the Supreme Court noted that deference should also be afforded an Administrative Law Judge's credibility, determinations and inferences drawn from the evidence, despite what the Court [or Board] may perceive as other, more reasonable conclusions, from the evidence. Martin, supra.

The standard of review for this Court is found in West Virginia Code § 23-5-15 which reads in pertinent part:

> (b) In reviewing a decision of the board of review, the supreme court of appeals shall consider the record provided by the board and give deference to the board's findings, reasoning and conclusions, in accordance with subsections (c) and (d) of this section.
>
> (c) If the decision of the board represents an affirmation of a prior ruling by both the commission and the office of judges that was entered on the same issue in the same claim, the decision of the board may be reversed or modified by the supreme court of appeals only if the decision is in clear violation of constitutional or statutory provision, is clearly the result of erroneous conclusions of law, or is based upon the board's material misstatement or mischaracterization of particular components of the evidentiary record. The court may not conduct a de novo re-weighing of the evidentiary record. If the court reverses or modifies a decision of the board pursuant to this subsection, it shall state with specificity the basis for the reversal or modification and the manner in which the decision of the board clearly violated constitutional or statutory provisions, resulted from erroneous conclusions of law, or was based upon the board's material misstatement or mischaracterization of particular components of the evidentiary record.

VI. LEGAL AUTHORITIES

VII. LAW AND ARGUMENT

The issue before this Court is whether, under West Virginia Code § 23-5-15 (c), the Workers' Compensation Board of Review erred in affirming the decision of the Office of Judges which has affirmed the ruling denying adding "major depressive disorder, single episode, severe, with psychotic features" as a compensable condition. The issue before the Workers' Compensation Board of Review was whether the Office of Judges' decision could be supported by the evidence of record.

As noted by the Administrative Law Judge on page four of his decision, the claimant submitted a closing argument arguing that the only issue for determination was whether the claimant's depression was a result of his compensable orthopedic injury. In his closing argument the claimant states that the weight of the evidence shows the claimant's depression was causally linked to the injury, and that the Order of November 4, 2008, should be reversed and the claimant's depression be recognized as a compensable component of the claim.

Such is clearly not the case. First the record is clear as noted by the medical records and the Administrative Law Judge that there has been no reliable evidence submitted in this claim that the anxiety and/or depression of the claimant has been caused by his compensable injury. This is evinced by the office note from Dr. Aranas dated February 19, 1999, clearly showing the claimant has been receiving treatment in the form of Xanax for an anxiety disorder well before the compensable injury date (Exhibit K). The office note from Dr. Aranas dated February 25, 2002, also shows a diagnosis of anxiety disorder which further confirms that the claimant has anxietal issues prior to and unrelated to his compensable injury.

Further, as noted by the Administrative Law Judge, although both sides submitted the Intake Narrative from University Psychiatric Associates dated June 30, 2004 (Exhibit F), it is the role of the Office of Judges as trier of fact to determine what the weight of the evidence demonstrates and to determine the reliability and credibility of such. Thus the Administrative Law Judge performed his statutory duty and properly determined that:

> [T]he claimant had a long history of depression and anxiety such that it was more likely anxiety and depression experienced by the claimant was an extension of the prior condition. While the intake interview of Mr. Downs said the claimant's psychiatric condition was "probably" precipitated by the injury and no doubt believed this conclusion was more likely than not, the evidence of the extended history of psychiatric conditions makes it more likely that the opposite is true.

See Administrative Law Judge Decision page five.

As noted above determinations regarding credibility and reliability by an Administrative Law Judge have been addressed in Martin, wherein the Court stated that the factual findings of an Administrative Law Judge should be upheld if they are supported by

substantial evidence and that it "cannot overlook the role that credibility plays in factual determinations, a matter reserved exclusively for the trier of fact." Court also noted that deference should also be afforded an Administrative Law Judge's credibility, determinations and inferences drawn from the evidence, despite what the Court [or Board] may perceive as other, more reasonable conclusions, from the evidence. Martin, supra.

West Virginia Code § 23-4-1 provides that an employee should receive compensation only for injuries and diseases received in the course of, and resulting from, employment. As there is no question but that the claimant has a long-standing anxiety and depression disorders pre-dating his compensable injury which were not aggravated by the compensable injury, the claimant should not receive compensation in the form of treatment for the disorders. Additionally, "it is . . . axiomatic that the employer, by subscribing to the workmen's compensation fund, does not thereby become the employee's insurer against all ills or injuries which may befall him." Jordan v. State Workmen's Compensation Comm'r, 156 W. Va. 159, 165, 191 S.E.2d 497, 501 (1972) (citing Barnett v. State Workmen's Compensation Comm'r, 153 W. Va. 796, 172 S.E.2d 698 (1970) and James v. Rinehart & Dennis Co., Inc., 113 W. Va. 414, 168 S.E. 482 (1933)).

Furthermore, the Intake Narrative (Exhibit F) makes it crystal clear that no physician recommended that the claimant seek treatment or a consult, but rather the claimant's mother, who apparently has issues of her own, had referred the claimant. Such a "referral" is not what is envisioned by Rule § 85-20-12.5.a which governs psychiatric treatment in workers' compensation claims, and shows that the initial evaluation must be authorized by the self-insured employer.

Although the Administrative Law Judge is correct the West Virginia Supreme Court of Appeals has recently overruled Rule § 85-20-12.2.a which governed psychiatric treatment in workers' compensation claims, and required that an injury-related psychiatric diagnosis has to be made within 6 months of the date of injury, he is equally correct that the Court did not address Rule § 85-20-12.5.a which governs psychiatric treatment in workers'

compensation claims, and shows that the initial evaluation must be authorized by the self-insured employer.

Additionally, the Administrative Law Judge was equally correct in that the law still requires proof by a preponderance of the evidence as set forth in West Virginia Code § 23-4-1g which states:

> (a) For all awards made on or after the effective date of the amendment and reenactment of this section during the year two thousand three, resolution of any issue raised in administering this chapter shall be based on a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution. The process of weighing evidence shall include, but not be limited to, an assessment of the relevance, credibility, materiality and reliability that the evidence possesses in the context of the issue presented. Under no circumstances will an issue be resolved by allowing certain evidence to be dispositive simply because it is reliable and is most favorable to a party's interests or position. If, after weighing all of the evidence regarding an issue in which a claimant has an interest, there is a finding that an equal amount of evidentiary weight exists favoring conflicting matters for resolution, the resolution that is most consistent with the claimant's position will be adopted.
>
> (b) Except as provided in subsection (a) of this section, a claim for compensation filed pursuant to this chapter must be decided on its merit and not according to any principle that requires statutes governing workers' compensation to be liberally construed because they are remedial in nature. No such principle may be used in the application of law to the facts of a case arising out of this chapter or in determining the constitutionality of this chapter.

The Workers' Compensation Fund was created and exists only for the payment of compensation for work-related injuries and is not a health and accident fund. Barnett v. State

Workmen's Compensation Comm'r, 153 W. Va. 796, 799, 172 S.E.2d 698, 700 (1970). "In order to establish compensability an employee who suffers a disability in the course of his employment must show by competent evidence that there was a causal connection between such disability and his employment." Deverick v. State Workmen's Compensation Director, 150 W. Va. 145, 144 S.E.2d 498 (1965) (Syl.pt. 3).

Although the employer must take the employee as he finds him - with all his attributes and all of his previous infirmities, the employer, by subscribing to the Workers' Compensation Fund, does not thereby become the employee's insurer against all ills or injuries which may befall him. Jordan.

"[I]t is unquestioned that when one incurs a disability personal to his own condition of health, though the disability may occur in the course of employment, it is not compensable." Jordan (citing Martin v. State Compensation Comm'r, 107 W. Va. 583, 149 S.E. 824 (1929). ". . . it is . . . axiomatic that the employer, by subscribing to the workmen's compensation fund, does not thereby become the employee's insurer against all ills or injuries which may befall him." Jordan (citing Barnett v. State Workmen's Compensation Comm'r, 153 W. Va. 796, 172 S.E.2d 698 (1970) and James v. Rinehart & Dennis Co., Inc., 113 W. Va. 414, 168 S.E. 482 (1933)).

Again, it should be remembered that this claim was ruled compensable for 846.0 Sprain/Strain Lumbosacral for an injury occurring on November 22, 2003. The employer has never referred the claimant for psychiatric treatment to deal with.

VIII. RULING REQUESTED

The claimant has not shown that there is a clear violation of any constitutional or statutory provision or that there was any clearly erroneous conclusion of law or any material misstatement or mischaracterization of the evidentiary record. The issue presented is a question

of fact and is not subject to *de novo* review by the Court. As a result, this Court should affirm the decision of the Workers' Compensation Board of Review.

Respectfully submitted,

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By Counsel

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APPENDIX TO RESPONSE
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EXHIBIT A: Workers' Compensation Board of Review order dated August 9, 2010

EXHIBIT B: Decision of Administrative Law Judge dated February 1, 2010

EXHIBIT C: Self-Insured Employer's Decision dated November 4, 2008

EXHIBIT D: Workers' Compensation Commission order dated December 31, 2003

EXHIBIT E: Report of Dr. Paul Bachwitt dated June 9, 2004

EXHIBIT F: Intake Narrative dated June 30, 2004, from William Downs, MSW

EXHIBIT G: Treatment records from Richard Gardner, PA-C from July 21, 2004, through June 1, 2006

EXHIBIT H: Report of Dr. Bruce Guberman dated June 9, 2009

EXHIBIT I: West Virginia Code § 85-20-12.5

EXHIBIT J: Office note from Dr. Bonifacio Aranas dated February 25, 2002

EXHIBIT K: Office note from Dr. Bonifacio Aranas dated February 19, 1999

EXHIBIT L: Office note from Dr. Bonifacio Aranas dated September 13, 1990

EXHIBIT M: Office note from Dr. Bonifacio Aranas dated March 31, 1994

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CERTIFICATE OF SERVICE

I, Marion E. Ray, attorney for the Respondent, Rockspring Development, Inc., do hereby certify that a true and exact copy of the foregoing "Brief on Behalf of Rockspring Development, Inc. in Opposition to Claimant's Petition for Appeal" was served upon the Respondent by forwarding a true and exact copy thereof in the United States mail, postage prepaid, this 20th day of September, 2010, addressed as follows:

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